No. 77-52

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD T. FORD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 550 F. 2d 732.

JURISDICTION

The judgment of the court of appeals was entered on February 3, 1977, and a petition for rehearing with a suggestion for rehearing *en banc* was denied on May 9, 1977. On June 6, 1977, Mr. Justice Marshall extended the time for the filing of a petition for a writ of certiorari to and including July 8, 1977. The petition was filed on that date and was granted on October 3, 1977 (A. 115). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a writ of *habeas corpus ad prosequendum* issued by a federal court to state authorities, directing the production for trial on federal criminal charges of a state prisoner against whom a federal detainer has previously been lodged, constitutes a "written request for temporary custody" rendering applicable the terms and conditions of Article IV of the Interstate Agreement on Detainers Act.

2. Whether respondent, by failing to raise the issue in the district court, waived the claim that his indictment should have been dismissed for violation of the Interstate Agreement on Detainers Act.

STATUTE INVOLVED

The Interstate Agreement on Detainers Act, 18 U.S.C. App., pp. 4475–4478, is set forth in an appendix to this brief, *infra*.

STATEMENT

1. In November 1971 a federal bench warrant issued authorizing respondent's arrest for the October 20, 1971, robbery of the Orange County Trust Company in Middletown, New York. Respondent was not apprehended until nearly two years later, on October 11, 1973, when federal agents executing this (and one other) warrant arrested him in Chicago (A. 106–111). Shortly after his arrest, respondent was turned over to Illinois authorities for extradition to Massachusetts on older, unrelated state charges. While in the custody of the Illinois authorities, respondent

requested a speedy trial on the federal charges by separate letters sent to the United States Attorney for the Southern District of New York and the United States District Court for the Southern District of New York (A. 87–90). Upon respondent's transfer to Massachusetts, federal officials lodged the federal bank robbery warrant as a detainer with Massachusetts prison authorities (A. 51, 74).

On March 21, 1974, following respondent's conviction in Massachusetts on the state charges,[1] an indictment (74 Cr. 279) was filed in the United States District Court for the Southern District of New York charging respondent with bank robbery and aggravated bank robbery, in violation of 18 U.S.C. 2113(a) and (d). On April 1, 1974, respondent was produced from Massachusetts for arraignment before the federal district court in New York pursuant to a writ of *habeas corpus ad prosequendum* issued by the court on March 25, 1974 (A. 1, 8–9).[2] The court directed the entry of a not guilty plea on behalf of respondent, who appeared without counsel, and then adjourned the proceedings for one week to enable respondent to secure an attorney (A. 19–20).[3]

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[1] Respondent pleaded guilty to the Massachusetts charges on February 8, 1974, and was sentenced forthwith to concurrent terms of eight to ten years' imprisonment (A. 51, 74).

[2] The writ was addressed to the warden of the Massachusetts correctional facility where respondent was incarcerated and to the United States Marshals for the Southern District of New York and the District of Massachusetts.

[3] On April 1, 1974, the government filed a notice of readiness for trial with respect to Indictment 74 Cr. 279 (A. 12, 52).

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Two days later, on April 3, 1974, a superseding indictment (74 Cr. 336) was filed charging respondent and one James R. Flynn with the same bank robbery initially charged in the first indictment, and also with use of a firearm in the commission of a bank robbery, in violation of 18 U.S.C. 924(c)(1), interstate transportation of a stolen automobile, in violation of 18 U.S.C. 2312, and conspiracy to commit the above offenses, in violation of 18 U.S.C. 371 (A. 14–17). On April 15, 1974, respondent pleaded not guilty to the charges contained in the new indictment, but co-defendant Flynn failed to appear, and a bench warrant was issued for Flynn's arrest (A. 28–30).[4] Trial was thereafter scheduled for May 28, 1974.

On May 17, 1974, the government moved to adjourn the trial for a period of 90 days or until Flynn was apprehended, whichever occurred first; the motion was supported, in part, by a sealed affidavit (A. 48, 60–65). On May 22, 1974, the motion was granted by the district court, and respondent's trial was rescheduled for August 21, 1974 (A. 65).[5] Respondent subsequently sought and was granted permission to be returned to Massachusetts, where his attorney's office was located, in order to facilitate preparation for trial (A. 66). He was transferred back to the Massachusetts prison on June 14, 1977 (A. 11).

[4] The court also, upon the government's motion, directed respondent to provide handwriting and hair samples within one week or face punishment for contempt (A. 32–35). Thereafter, on April 25, 1974, the court held respondent in civil contempt for refusing to furnish the hair samples (A. 45).

[5] On granting the adjournment, the court found no prejudice to respondent in the preparation of his defense and held that the government was entitled to a reasonable interval to attempt to apprehend Flynn so that judicial resources could be conserved by having respondent and his co-defendant tried jointly (A. 63, 64).

In August 1974 the case was reassigned to a different judge (following the first judge's resignation), and trial was reset for November 18, 1974 (A. 68). On November 1, however, the government requested an additional adjournment of up to 90 days in which to apprehend Flynn (A. 71–82) and filed a second sealed affidavit in support of this motion. On November 4 respondent moved to dismiss the indictment on the ground that he had been "denied his rights to a speedy trial as guaranteed to him by the Federal Constitution and the Rules of the Southern District of New York" (A. 83–91). The supporting papers alleged that respondent was being denied furlough privileges while the federal detainer remained lodged against him (A. 86), but respondent did not invoke in his motion papers the provisions of the Interstate Agreement on Detainers Act ("Agreement") as a basis for relief.[6] The court denied the speedy trial motion, granted the government's application for adjournment, and set a new trial date of February 18, 1975 (Pet. App. 4a).

On February 18, however, the district judge was engaged in a lengthy stock fraud trial, and a new date of June 11, 1975, was set. While respondent objected to the adjournment on the basis of his earlier

[6] Nor did respondent demand final disposition of the indictment pursuant to Article III of the Agreement. See note 9, *infra*.

speedy trial motion, he did not request reassignment of the case to another judge (A. 92–94). In the following month, the district court announced a "crash" program for the disposition of civil cases, to commence on June 1. Because of this program, respondent's trial was postponed a final time, until September 2, 1975 (Pet. App. 4).

On August 8, 1975, the government secured respondent's presence for trial from Massachusetts prison authorities by means of a writ of *habeas corpus ad prosequendum* issued by the district court (A. 98–99). At the beginning of trial respondent again moved to dismiss the indictment on speedy trial grounds; the motion was denied (A. 100–105). Following a six-day trial, in which 36 witnesses testified for the government and the stipulated testimony of 12 other witnesses was read to the jury, respondent was convicted on all counts.[1] He was sentenced to concurrent terms of five years' imprisonment, which the district court recommended be served concurrently with respondent's Massachusetts sentence. At sentencing the court noted that respondent had availed himself of the opportunity to earn a high school equivalency diploma while incarcerated in Massachusetts during the preceding year (A. 112–113).

[1] Respondent has not challenged his simultaneous convictions under both 18 U.S.C. 2113(d) and 18 U.S.C. 924(c)(1). See *Simpson* v. *United States*, Nos. 76–5761 and 76–5796, argued November 1, 1977. Although the trial judge imposed concurrent sentences on those counts, a procedure prohibited by Section 924(c), the government has not sought correction of the sentence.

2. On appeal, respondent argued for the first time that his indictment should have been dismissed with prejudice because he had not been tried within 120 days after his initial arrival in the Southern District of New York and because he had been returned to state prison in Massachusetts following his arraignment without having first been tried on the federal charges, in alleged violation of Articles IV(c) and IV(e) of the Agreement. Article IV of the Agreement provides that the prosecuting authority of a member state in which criminal charges are pending against a defendant serving a prison sentence in another member jurisdiction may lodge a "detainer" with the prison authority of that jurisdiction and, upon presentation of a "written request for temporary custody," obtain temporary custody of the prisoner for purposes of trial.[2] The Agreement further provides that a prisoner so procured must be tried (a) within 120 days of his arrival in the receiving state (except where a continuance is granted "for good cause shown in open court" in the presence of the prisoner or his counsel) and (b) prior to being returned to the sending state, or else the charges against

[2] Both the United States and Massachusetts had become signatories to the Agreement prior to the relevant events in this case. Act of December 9, 1970, Sections 1–8, 84 Stat. 1397–1403, 18 U.S.C. App., pp. 4475–4478; Mass. Gen. Laws, ch. 276, App. §§ 1–1 to 1–8 (1966).

him shall be dismissed with prejudice. Articles IV(c), IV(e), V(c).[9]

A divided panel of the court of appeals reversed the conviction and remanded the case to the district court with directions to dismiss the indictment with prejudice (Pet. App. 1a–29a). The court held that, whether or not a writ of *habeas corpus ad prosequendum* used to secure custody of a state prisoner serves as a "detainer" (see *United States* v. *Mauro*, 544 F. 2d 588 (C.A. 2), certiorari granted, No. 76–1596, October 3, 1977), "once a federal detainer has been lodged against a state prisoner, the habeas writ constitutes a 'written request for temporary custody' within the meaning of Article IV of the Detainers Act" (Pet. App. 21a). The court rejected the government's argument that the Agreement, even if it allows prisoners to clear detainers and to compel prompt disposition of pending charges against them (Article III), was not intended to affect the federal

[9] Article III of the Agreement provides an alternative means by which transfer of the prisoner may be accomplished. Under Article III(c), prison officials are required to notify each prisoner of any criminal charge on the basis of which a detainer has been lodged against him by another jurisdiction, and, further, to inform the prisoner of his right to request trial on the charges underlying the detainer. The prisoner may then act to clear such a detainer by filing a request with the appropriate authorities in the prosecuting jurisdiction for final disposition of the charge against him. He must thereupon be brought to trial (a) within 180 days of delivery of this request and (b) without being returned to the sending state after his transfer to the prosecuting state, or else the charges are subject to dismissal with prejudice. Articles III(a), III(d), and V(c).

government's concurrent right to obtain custody of a prisoner for trial under the power of the writ *ad prosequendum*.[10] The majority reasoned that failure to treat a writ as a "request" under the Agreement, if the writ was served after the lodging of a detainer, "would vitiate [the] operation [of the Agreement] insofar as it affects federal detainers, since virtually all federal transfers are conducted pursuant to the writ" (Pet. App. 20a). Moreover, the court stated that the government's proposed construction would "impair the operation of the Agreement as a whole, since federal detainers form a large percentage of all detainers outstanding" (*ibid.*).

After having thus concluded that the Agreement was applicable, the court then held that the provisions of Article IV(c) had been violated.[11] The majority ruled that the adjournments prior to that of February 18, 1975, were properly granted but that the subsequent adjournments neither were "for good cause" nor granted with "the defendant or his counsel being present" (Pet. App. 23a–25a). Based upon this violation of the Agreement, the court held that Arti-

[10] The court also rejected, without discussion, the government's alternative argument (Br. 16–18) that respondent had waived any claim under the Agreement by failing to raise such claim prior to trial.

[11] The court, however, rejected respondent's claim that Article IV(e) had been violated by his return to state prison in Massachusetts prior to his trial on the federal charges. Since respondent himself had requested the transfer, the court held that he waived any objection to the transfer under Article IV(e) (Pet. App. 21a–22a).

cle V(c) mandated dismissal of the indictment (*id.* at 25a)."

In dissent, Judge Moore expressed his unwillingness "to thwart the jury's determination of guilt" on the basis of calendar technicalities, "particularly where no showing of prejudice therefrom has been made" (Pet. App. 28a–29a).

INTRODUCTION AND SUMMARY OF ARGUMENT

1. From the early 19th century, whenever the United States has sought to try state prisoners on federal charges, it has proceeded by serving state authorities with a writ of *habeas corpus ad prosequendum*, directing them to surrender custody of the prisoner to federal officials. Whether or not obedience to the writ was required, state officials routinely complied with its directive, enabling state prisoners to receive speedy disposition of the federal charges in accordance with their Sixth Amendment rights. In some cases, the federal government retained custody of the prisoner until after trial; in others, the prisoner was returned after arraignment to convenient state facilities pending further

[12] The court of appeals did not discuss the government's contention (Br. 28n*) that it should in any event dismiss only the charge upon which the detainer was filed (and respondent transferred to federal custody) and not the additional charges contained in the superseding indictment. Subsequently the Second Circuit has held that dismissal of charges upon which a detainer was based does not bar prosecution on other charges even though they arise out of the same conduct. *United States* v. *Cumberbatch*, No. 77-1070, decided September 19, 1977, petition for a writ of certiorari pending, No. 77-5590.

proceedings. While not without its occasions for abuse, the system appears to have been generally effective and to have caused little recorded complaint.

Different circumstances prevailed, however, when a state wished to try prisoners of the federal government or of another state. Inter-state transfers could typically be accomplished only through formal extradition proceedings or by means of a cumbersome process of agreement between the states' governors. Although federal prisoners could be obtained with less formality, states remained dependent on federal notions of comity, and the basis for surrendering federal custody was not always clear. As a consequence, states (which unlike the federal government were not thought to be subject to constitutional speedy trial requirements) often deferred their efforts to dispose of pending charges until after the prisoner was released from his existing sentence. Frequently, after having filed a notice of those charges with the incarcerating jurisdiction, they abandoned efforts at prosecution entirely.

The Interstate Agreement on Detainers, drafted in the late 1950s, simplified inter-state transfers and provided a method for the prisoner to clear outstanding detainers against him. Without subscription by the United States, however, member states were still forced to obtain federal prisoners by the traditional unstructured process, a problem that caused increasing concern after this Court held that the states must exercise greater efforts to try such prisoners. See *Smith* v. *Hooey*, 393 U.S. 374; *Dickey* v. *Florida*, 398 U.S. 30. Moreover, federal prison authorities ex-

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pressed their continuing concern about long-standing state detainers that interfered with prisoner treatment and rehabilitation.

2. In 1970, at the urging of the Department of Justice, Congress enacted legislation making the United States and the District of Columbia parties to the Interstate Agreement on Detainers. Although the 1970 Act essentially incorporated the entire Agreement without modification of its language and thus could be read to make the United States subject to the Agreement for all purposes, substantial evidence exists that Congress had no such intention. To begin with, the federal government did not need additional (indeed, less expedient) procedures to obtain state prisoners, in view of the well-established and smoothly functioning practice pursuant to the writ of *habeas corpus ad prosequendum*. Nor does it appear that the federal government had traditionally abused the detainer system, as some states had done. Furthermore, the language of several provisions of the Agreement applies awkwardly at best to the federal government as a receiving state and often leads to results that the Department of Justice, as a proponent of the legislation, can hardly have intended to encourage Finally, the Senate and House Reports and the brief debates all suggest an expectation that the United States would provide, but not seek, prisoners under the Agreement. In sum, there is virtually no evidence that Congress meant to surround the procurement of state prisoners for federal trial with new restrictions

or to cause significant new problems for federal prison authorities charged with the custody of such prisoners.

Post-Act developments are consistent with this understanding. After the Act became effective in 1971, the United States surrendered federal prisoners pursuant to the Agreement but continued, apparently without exception, to obtain state prisoners by writ of *habeas corpus ad prosequendum*. During that period, as before, state prisoners were given speedy trials in accordance with the constitutional guarantee and applicable local rules, but their cases were handled without regard to the special strictures of Article IV of the Agreement.

In the Speedy Trial Act of 1974 Congress provided a method by which state prisoners could clear federal detainers outstanding against them and made trials of prisoners subject to the time limits of that Act. Neither the Speedy Trial Act nor its legislative history in any way indicates that Congress thought the United States was already required to obtain state prisoners under the Agreement; to the contrary, relevant materials demonstrate Congress' intent to establish time limits and protections where it believed none previously existed.

The history of the Agreement therefore provides strong support for the belief that Congress intended the United States to participate only as a sending state. Such an interpretation would avoid needless conflict among the writ of *habeas corpus*, the Agreement, and the Speedy Trial Act and would allow federal prosecutors and prison officials to operate

under a uniform system without sacrifice of any substantial protections for state prisoners. Federal officials would continue to obtain state prisoners by writ of *habeas corpus,* subject to the time constraints of the Speedy Trial Act, and state prisoners could clear any detainers under the terms of that Act. At the same time state officials would be able to obtain federal prisoners pursuant to Article IV of the Agreement, and federal prisoners would be able to demand trial on outstanding state detainers under Article III.

3. Even if this Court concludes that the United States must be held to have adhered to the Agreement as a receiving as well as a sending state, it does not follow that the Agreement should be regarded as the exclusive means by which the United States can obtain state prisoners in connection with federal criminal proceedings or that the *ad prosequendum* writ is properly viewed as a "written request for temporary custody" within the meaning of Article IV of the Agreement. In the context of the Agreement, the word "request" is an ambiguous one when applied to the command of a judicially issued writ. In light of the complete absence of evidence that Congress in adopting the Agreement intended to impose conditions on the traditional writ of *habeas corpus* to make it more difficult for the United States to house and try state prisoners, and in light of the needless conflict that would otherwise be created with certain provisions of the Speedy Trial Act, we submit that the Court should construe the term "request" in Article IV of the Agreement as not encompassing the *ad prosequendum* writ.

The correctness of this construction is reinforced by the specific language of the speedy trial provision of the Agreement (Article IV(c)), invoked by the court of appeals to reverse respondent's conviction, which by its terms is applicable only "[i]n respect of any proceeding made possible by this article * * *." Whatever else may be said about the relationship between the writ and a "request" under the Agreement, it is beyond dispute that the procurement of state prisoners to stand trial on federal charges by means of the *ad prosequendum* writ was not "made possible" by the United States' adherence to the Agreement.

4. Finally, even assuming that respondent's rights under Article IV(c) of the Agreement were violated, he has nevertheless waived that claim by failing to raise it at any time in the district court. The right invoked by respondent for the first time in the court of appeals is not one of constitutional dimensions and, assuming there has been no violation of Sixth Amendment rights, does not suggest that the conviction of respondent was unjust, since it is unrelated to the reliability of the jury's verdict of guilt. The claim had ripened fully prior to trial and was capable of determination without the trial of the general issue. Unlike certain other claims of this type, Rule 12 of the Federal Rules of Criminal Procedure does not explicitly preserve the right to raise this claim at any time, from which it may fairly be inferred that the claim cannot be raised for the first time on appeal.

ARGUMENT

I. CONGRESS INTENDED THAT THE UNITED STATES PARTICIPATE IN THE INTERSTATE AGREEMENT ON DETAINERS ONLY FOR THE PURPOSE OF MAKING FEDERAL PRISONERS AVAILABLE TO OTHER MEMBER JURISDICTIONS AND ALLOWING THEM TO REQUEST TRIAL ON OUTSTANDING DETAINERS

The Second Circuit in the present case and in *United States* v. *Mauro, supra,* has concluded that the United States must observe all the conditions of the Interstate Agreement on Detainers even though it seeks to obtain state prisoners by writ of *habeas corpus ad prosequendum* without reliance on the Agreement. The court of appeals found that result to be compelled by the "clear and unequivocal language" of the Agreement and stated: "Any construction which would cast the United States in the role of a limited partner is at odds with the entire spirit and scope of the Agreement" (*United States* v. *Mauro,* 544 F. 2d at 594).

Substantial evidence exists, however, that Congress intended the United States to participate in the Agreement only for the purposes of allowing states more readily to obtain federal prisoners and allowing such prisoners to seek trial on outstanding detainers lodged against them with their federal custodian. As we shall discuss (pp. 22–29, *infra*); the Agreement was principally designed to provide states with a method of obtaining prisoners from other jurisdictions and to eliminate the related effects of stale detainers on prisoner rehabilitation. Because the federal government had long been able to obtain

state prisoners by writ of *habeas corpus ad prosequendum,* and because the Sixth Amendment required speedy trial on federal charges, those concerns were not prominent with regard to federal prosecutions. Moreover, to the extent that outstanding federal detainers and delayed federal trials were even a modest problem, Congress corrected it by the Speedy Trial Act of 1974. Thus, it is at odds with the congressional intent to construe the Agreement as a partial repeal of the federal *habeas corpus* statute—a construction that, in addition, conflicts with the provisions of the Speedy Trial Act.

We recognize that the term "state" in the Agreement is defined to include the United States and carries no disclaimer that the United States shall participate only as a sending state. But a literal reading of the statute, in our view, leads to inconsistencies, even absurdities, that can be avoided by construing the Agreement in the context of its purpose and history and with proper regard for the teachings of other federal statutes. See *Train* v. *Colorado Public Interest Research Group,* 426 U.S. 1, 10. Although the language of a statute remains the best evidence of the legislative intent, it "cannot be divorced from the circumstances existing at the time it was passed, and from the evil which Congress sought to correct and prevent." *United States* v. *Champlin Refining Co.,* 341 U.S. 290, 297; *Church of the Holy Trinity* v. *United States,* 143 U.S. 457. Moreover, it is appropriate to study the statute in conjunction with other statutes addressing the same or similar problems and to give each statute consistent meanings to the extent

possible. *Kokoszka* v. *Belford*, 417 U.S. 642; *British American Oil Producing Co.* v. *Board of Equalization of Montana*, 299 U.S. 159; *Ryan* v. *Carter*, 93 U.S. 78. We now turn to those materials.

A. THE WRIT OF *HABEAS CORPUS AD PROSEQUENDUM*

Since enactment of the First Judiciary Act in 1789, 1 Stat. 81, the writ of *habeas corpus ad prosequendum* has been available to federal authorities for the purpose of obtaining prisoners for trial. Although the Judiciary Act did not specifically mention the writ *ad prosequendum*, Mr. Chief Justice Marshall, in *Ex parte Bollman*, 4 Cranch 75 (1807), soon established that the term "*habeas corpus*," as found in the statute, was a generic term encompassing many different species of the writ including the writ *ad prosequendum*. Relying on 3 Blackstone, *Commentaries* 129, the Chief Justice further noted that authority to issue the *ad prosequendum* writ was " 'necessary to

[13] Section 14 of the First Judiciary Act gave authority to "all the * * * courts of the United States * * * to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And * * * either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment.—*Provided*, That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify. 1 Stat. 81–82 (1789)," quoted in *Carbo* v. *United States*, 364 U.S. 611, 614.

remove a prisoner, in order to prosecute [him], * * * or [for him] to be tried in the proper jurisdiction wherein the act was committed.' " 4 Cranch at 97. In *Carbo* v. *United States*, 364 U.S. 611, 615, this Court reiterated that Congress, in the Judiciary Act, "had without qualification authorized the customary issuance of the writ *ad prosequendum* by a jurisdiction not the same as that wherein the prisoner was confined."

Although Congress has revised the *habeas corpus* statute (now 28 U.S.C. 2241) on several occasions, "there is no indication that there is required today a more restricted view of the writ of *habeas corpus ad prosequendum* than was necessary in 1807 when Chief Justice Marshall considered it." *Carbo* v. *United States, supra*, 364 U.S. at 619–620. To the contrary, Congressional enactments after 1789 served to increase the power of the writ by clarifying the authority of the federal courts to issue the writ without jurisdictional limitation throughout the territory of the United States. *Id.* at 615–618.[14] The writ thus has remained "necessary as a tool for jurisdictional potency

[14] It was not until 1948, however, that an explicit reference to the *ad prosequendum* writ was contained in a federal statute. Section 2241 of Title 28 was enacted as part of a comprehensive effort by Congress to codify and revise the laws relating to the federal judiciary and judicial procedure. S. Rep. No. 1559, 80th Cong., 2d Sess. 1 (1948). In recommending passage of the legislation, the report of the Senate Judiciary Committee stated that "a thorough codification and revision of the statutes relating to the judiciary and its procedure is very much in the public interest in order that the law in this important field may be clear, certain, and readily available." *Ibid.*

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as well as administrative efficiency" (*id.* at 618) and has gained increasing importance, especially in instances requiring accommodation between federal and state authorities in facilitating the interjurisdictional transfer of prisoners (*id.* at 620–621).

It appears that state authorities have routinely complied with the writ *ad prosequendum* throughout its long history. See *United States* v. *Kenaan,* 557 F. 2d 912, 915 n. 8 (C.A. 1), petition for a writ of certiorari pending, No. 77–206; *United States* v. *Sorrell* and *United States* v. *Thompson,* C.A. 3, Nos. 76–1647 and 76–1976, decided August 22, 1977 (*en banc*), petition for writs of certiorari pending, No. 77–593, dissenting opinion of Garth, J., at 11. Although a line of federal cases has assumed without much analysis that the states comply only as a matter of comity,[15] we think that Judge Mansfield, dissenting in *Mauro,* was surely correct that "if a state institution refused to obey a federal writ of habeas corpus ad prosequendum properly issued pursuant to § 2241 and thus provoked a federal-state confrontation, the writ would be held enforcible against the institution under the Supremacy Clause" (544 F. 2d at 596; footnote omitted). See *United States* v. *Scallion,* 548 F. 2d 1168, 1173, n. 7 (C.A. 5), petition for a writ of certiorari pending, No. 76–6559; *United States* v. *Kenaan, supra,* 557 F. 2d at 915 n. 8; cf. *Ex parte Royall,* 117 U.S. 241. Since issuance of a writ under Section 2241 is surely a legitimate exercise of the power of federal courts to adjudi-

[15] This Court in *Carbo* v. *United States, supra,* 364 U.S. at 620–621, n. 20, found it unnecessary to reach that question.

cate cases involving offenses against the criminal laws of the United States, in the event of a federal-state collision over the execution of a writ authorized by Section 2241, the federal court could legitimately enforce its process to vindicate federal laws. As Judge Mansfield observed (Pet. App. 19a), there is no necessary inconsistency between those cases recognizing "the role of comity in securing federal-state cooperation, and a case requiring application of the Supremacy Clause where comity might fail." Cf. *Wahrlich* v. *State of Arizona,* 479 F. 2d 1137, 1138, (C.A. 9), certiorari denied, 414 U.S. 1011; *Harris* v. *Brewer,* 434 F. 2d 166, 168 (C.A. 8); *Smith* v. *State of Kansas,* 356 F. 2d 654 (C.A. 10), certiorari denied, 389 U.S. 871.

The Interstate Agreement on Detainers, therefore, did not provide the United States with a sorely-needed method of obtaining state prisoners. Long before the Agreement had been drafted, the use of the writ to bring a state prisoner before a federal court for trial and sentence had become "standard operating procedure." *United States* v. *Schurman,* 84 F. Supp. 411, 413 (S.D. N.Y.).[16] In addition to aiding the federal

[16] The courts have generally subscribed to the proposition that a prisoner lacks standing to challenge the use of the *ad prosequendum* writ to bring him before the district court. See, *e.g., Ponzi* v. *Fessenden,* 258 U.S. 254, 260; *Chunn* v. *Clark,* 451 F. 2d 1005, 1006 (C.A. 5); *McDonald* v. *Ciccone,* 409 F. 2d 28, 30 (C.A. 8); *McDonald* v. *United States,* 403 F. 2d 37, 38 (C.A. 5); *Derengowski* v. *United States Marshal, Minneapolis Office, Minnesota Division,* 377 F. 2d 223, 223–224 (C.A. 8), certiorari denied, 389 U.S. 884; *United States ex rel. Moses* v. *Kipp,* 232 F. 2d 147, 149–150 (C.A. 7); *Stamphill* v. *Johnson,* 136 F. 2d 291, 292 (C.A. 9), certiorari

courts in the exercise of their jurisdiction over criminal cases, the writ *ad prosequendum* (which is subject to immediate execution) facilitated the expeditious resolution of pending criminal charges and thus helped to ensure the defendant a speedy trial in accordance with constitutional guarantees. See *McDonald* v. *Ciccone*, 409 F. 2d 28, 30 (C.A. 8); *United States ex rel. Moses* v. *Kipp*, 232 F. 2d 147, 149–150 (C.A. 7).

B. THE INTERSTATE AGREEMENT ON DETAINERS

Although the federal government had available a completely satisfactory mechanism for obtaining prisoners in other jurisdictions for trial, the experience of the individual states was quite different. Before promulgation of the Interstate Agreement on Detainers, state authorities had no uniform, expedient procedure, such as the writ, for obtaining custody of prisoners incarcerated by another state or by the federal government.

The traditional method by which state prosecuting authorities gained custody of a prisoner held in another state was the formal extradition proceeding (see United States Constitution, Art. IV, Section 2, cl. 2; 18 U.S.C. 3182; Uniform Criminal Extradition Act, 11 Uniform Laws Annotated, pp. 60 *et seq.* (West 1974)).[17] Under the Uniform Criminal Extradition Act, the prosecuting attorney in the requesting state

denied, 320 U.S. 776; *Alston* v. *United States*, 405 F. Supp. 354, 356 (W.D. Va.); *Rose* v. *United States*, 365 F. Supp. 841, 844 (N.D. Ill.); cf. *Frisbie* v. *Collins*, 342 U.S. 519.

[17] The Extradition Act has been adopted in 47 States.

first had to ask the governor of his state to issue a demand for return of the fugitive. The demand for rendition was issued to the governor of the holding state and had to meet certain formal requirements. Upon receipt of the demand, the governor of the holding state was entitled to investigate the relevant circumstances in order to determine whether the fugitive should be surrendered; if the governor decided to comply with the demand, he issued an arrest warrant against the fugitive. After execution of the governor's warrant, the fugitive was brought before a court, advised of his right to counsel, and allowed to test the legality of his arrest through *habeas corpus*. See Uniform Criminal Extradition Act, *supra*, at §§ 5, 10, 11.[18]

Alternatively, the governors of two states could enter into a special contract controlling the delivery of prisoners. While it was possible to provide for simplified procedures in such contracts, the effort involved, except where transfers were frequent, generally outweighed the benefits. Moreover, it was not feasible for each state to undertake negotiation of contracts with 49 other states simply to provide an alternative to the cumbersome extradition process.

State authorities seeking to procure federal prisoners did not have recourse to the extradition proc-

[18] Only certain questions may be raised in the *habeas* proceeding, including whether (1) a crime has been charged in the requesting state; (2) the fugitive in custody is the one charged; and (3) the fugitive was in the requesting state at the time the alleged crime was committed. See *Hyatt* v. *People ex rel. Corkran*, 188 U.S. 691, 709; *United States ex rel. Tucker* v. *Donovan*, 321 F. 2d 114, 116 (C.A. 2), certiorari denied *sub nom. Tucker* v. *Kross, Correction Commissioner*, 375 U.S. 977.

ess. See *Thomas* v. *Levi*, 422 F. Supp. 1027 (E.D. Pa.); cf. *United States* v. *Guy*, 456 F.2d 1157 (C.A. 8), certiorari denied, 409 U.S. 896; *Derengowski* v. *United States*, 404 F. 2d 778 (C.A. 8), certiorari denied, 394 U.S. 1024. To obtain federal prisoners, therefore, the states would petition federal officials either formally or informally and trust that the officials would comply as a matter of comity. *Ponzi* v. *Fessenden*, 258 U.S. 254; *Tarble's Case*, 13 Wall. 397; *Ableman* v. *Booth*, 21 How. 506. While the federal government generally cooperated with such efforts to dispose of charges pending against federal inmates (see *Smith* v. *Hooey*, 393 U.S. 374, 381, n. 13), federal prison officials were concerned about their authority to deliver prisoners into state custody (see Bureau of Prisons Policy Statement No. 2001.4, March 2, 1971),[19] and states were often reluctant to solicit exercise of their discretion. See, *e.g.*, *Smith* v. *Hooey*, *supra*, 393 U.S. at 376–377. The absence of a uniform, reliable, and speedy mechanism for transferring federal prisoners to the states for prosecution generated considerable confusion over the appropriate legal procedure to be used and often resulted in lengthy pretrial delays, undermining the interests of both the prisoner and the prosecuting authority. See,

[19] Under 18 U.S.C. 4085 the Attorney General is authorized to transfer a federal prisoner to a facility within the requesting state for trial on state charges, "if he finds it in the public interest to do so."

We note that one method of petitioning the federal government was by writ of *habeas corpus ad prosequendum* (see, *e.g.*, *United States ex rel. Esola* v. *Groomes*, 520 F. 2d 830 (C.A. 3)). While we believe that the Supremacy Clause requires state authorities to obey a *habeas corpus* writ issued in aid of the federal court's jurisdiction over criminal cases, the writs do not have the same effect when issued by state courts to federal authorities. In such cases, compliance with the writ is a discretionary matter. *Ponzi* v. *Fessenden*, *supra*.

e.g., *Trigg* v. *State of Tennessee*, 507 F. 2d 949 (C.A. 6), certiorari denied, 420 U.S. 938.

To meet (or perhaps to avoid) the limitations inherent in the formal legal procedures then available, law enforcement authorities developed an informal and unregulated practice whereby the jurisdiction in which charges were pending would, instead of trying to obtain the prisoner for prompt trial through the formal extradition process, simply file a "detainer" with prison officials holding the prisoner in another jurisdiction. This detainer did not request the prisoner's surrender but was simply "a notice to prison authorities that charges [were] pending against an inmate elsewhere, requesting the custodian to notify the sender before releasing the inmate." *Ridgeway* v. *United States*, 558 F.2d 357, 360 (C.A. 6). Prison officials customarily complied with this "request that the prisoner not be released until he could be taken into custody by the requesting state." *United States* v. *Kenaan*, *supra*, 557 F. 2d at 915. See also, Council of State Governments, *Suggested State Legislation Program for 1957*, p. 74 (1956); cf. *Moody* v. *Daggett*, 429 U.S. 78, 80–81, n. 2. The prosecuting authorities in the requesting jurisdiction, upon being notified of the prisoner's impending release, would either withdraw

the detainer or arrange to take custody of the prisoner at the time of his release.[20]

This system, while more convenient, had numerous detrimental side-effects. Because the prisoner was normally required to complete his sentence in the holding state before being tried in the requesting jurisdiction, extensive pre-trial delays occurred, with the resultant loss of evidence, disappearance of witnesses and fading memories. The difficulties in preparing a defense generally engendered by extensive delay were made worse for an inmate imprisoned outside the jurisdiction in which he was charged. See *Smith* v. *Hooey, supra,* 393 U.S. at 379–380. Furthermore, the existence of a detainer itself often caused prison officials to restrict the activities and privileges available to the prisoner, and the inmates sometimes lost interest in institutional opportunities because of continuing uncertainties about the disposition of outstanding charges.[21]

The Interstate Agreement on Detainers was promulgated in 1956 under the auspices of the Council of State Governments to correct this unsettled sit-

[20] The state still had to proceed through the extradition process at the time of the prisoner's release. At that time, however, authorities in the incarcerating state would have a diminished interest in resisting relinquishment of custody, and the prosecuting state had the benefit of additional time in which to decide whether to pursue the charges.

[21] Sentencing problems also arose. The court was faced with the dilemma of attempting to impose an appropriate sentence upon a convicted defendant against whom a detainer had been lodged by another jurisdiction and who thus faced the possibility of having to serve subsequent additional sentences. See Council of State Governments, *Suggested State Legislation Program for 1957, supra*.

uation.[22] Article I declares that it is the purpose of the Agreement "to encourage the expeditious and orderly disposition of [outstanding] charges and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints." Article I also states that "proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures" and that "[i]t is the further purpose of this agreement to provide such cooperative procedures."

The Agreement sought to achieve its purposes in two ways. Article III of the Agreement (App., *infra*),

[22] The movement toward promulgation of the Agreement began in 1948, when the Joint Committee on Detainers was formed. The committee included representatives from several organizations interested in developing possible solutions to problems caused by the placing of detainers. The Joint Committee issued a report which contained a statement of "aims or guiding principles" for handling detainers. The statement stressed the need for prompt investigation and disposition of detainers, and for cooperative efforts among the states to settle detainers.

During 1955 and 1956 the Joint Committee on Detainers was informally reconstituted under the auspices of the Council of State Governments. The committee developed three specific proposals dealing with the disposition of detainers. The Interstate Agreement on Detainers was among the proposals, which were later approved at a conference jointly sponsored by the American Correctional Association, the Council of State Governments, the National Probation and Parole Association, and the New York Joint Legislative Committee on Interstate Cooperation. Council of State Governments, *Suggested State Legislation Program for 1957, supra*, at pp. 74–76. Presently, 46 states plus the United States and the District of Columbia are adherents to the Agreement.

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which is principally addressed to the problem of outstanding detainers, allows the inmate to initiate proceedings to dispose of pending charges underlying any detainers lodged against him by another jurisdiction.[23] Prison officials are required to notify the prisoner of any detainer filed against him and of his right to request final disposition of the charges on which the detainer is based. Article III(c). The prisoner may then send to the warden a written request for final disposition, which the warden is required to forward, together with a certificate of inmate status and an offer to deliver temporary custody of the prisoner, to the prosecutor in the jurisdiction in which the charges are pending. Articles III(a), III(b), and V(a).

Article IV of the Agreement, which is principally concerned with providing a method by which member states can obtain prisoners, permits a prosecutor to submit a written request for temporary custody or availability to the prison official in whose custody the prisoner is being held. Immediate delivery of the prisoner is not required, however, for "there shall be a

[23] Before this Court's decision in *Braden* v. *30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, which permitted the aggrieved prisoner to invoke *habeas corpus* in the district where the charges were pending, a prisoner had no other means to challenge the validity of the detainer and the underlying charges. The prisoner also had no statutory or constitutional entitlement to rehabilitative programs sufficient to invoke general principles of due process to challenge the effects, if any, of the existence of a detainer upon the conditions of his confinement. See *Moody* v. *Daggett*, 429 U.S. 78, 88, n. 9; *Solomon* v. *Benson*, C.A. 7, No. 76-1959, decided October 6, 1977, slip op. 7.

period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the Governor of the sending State may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner." Article IV(a). If the Governor does not disapprove the request, "the appropriate authority in a sending State shall offer to deliver temporary custody of such prisoner to the appropriate authority in the State where such indictment, information or complaint is pending against such person in order that speedy and efficient prosecution may be had." Article V(a).

The Interstate Agreement on Detainers was drafted primarily with the states in mind. The possibility of joinder by the United States was left open, however, in view of the problems arising in certain state-federal situations (see pp. 30–32, *supra*). It is against that background that Congress enacted the Interstate Agreement on Detainers Act.

C. PASSAGE OF THE INTERSTATE AGREEMENT ON DETAINERS ACT

Although bills proposing federal enactment of the Agreement had been introduced as early as 1963 (H.R. 8365, 88th Cong., 1st Sess. (1963)) and again in 1968 (H.R. 15421, 90th Cong., 2d Sess. (1968); see H.R. Rep. No. 1332, 90th Cong., 2d Sess. (1968)), Congress did not finally pass the legislation until 1971. During that interval, decisions of this Court had made it increasingly imperative that states have ready access to federal prisoners wanted on state charges. In *Klopfer* v. *North Carolina*, 386 U.S. 213, this Court had held

that the Sixth Amendment right to a speedy trial was enforceable against the states under the Fourteenth Amendment. Shortly thereafter, in *Smith* v. *Hooey, supra,* and *Dickey* v. *Florida,* 398 U.S. 30, the Court made clear that state authorities must make a diligent effort to bring cases against prisoners to trial, even when the prisoner is serving a sentence in a federal institution outside the territorial jurisdiction of the prosecuting state. The Senate Report supporting enactment of the Agreement expressly referred to the *Smith* and *Dickey* decisions and stated that "enactment of this legislation would afford defendants in criminal cases the right to a speedy trial and diminish the possibility of convictions being vacated or reversed because of a denial of this right." S. Rep. No. 91–1356, 91st Cong., 2d Sess. 2 (1970). Thus, the general background of the Agreement and the specific events leading to its enactment by Congress suggest quite strongly that it was motivated by the desire to resolve problems faced by state governments in bringing cases against federal prisoners to trial.

That inference is supported by the materials before Congress at the time that the Act was passed.[24] For

[24] The Agreement was enacted without amendment of the original text as promulgated in 1956. Moreover, the Agreement was adopted by the Congress without opposition (see 116 Cong. Rec. 38840 (1970) (remarks of Senator Hruska); 116 Cong. Rec. 13999 (1970); *id.* at 38842, and was passed by both houses under suspension of the rules. 116 Cong. Rec. 14000 (1970); *id.*, at 38842. Accordingly, the materials prepared by the Council of State Governments may properly be used in construing the Agreement. See Sutherland, *Statutory Construction,* § 48.11, pp. 212–213 (4th ed. 1973).

example, the virtually identical House and Senate reports both emphasized the states' obligation (established by *Smith* and *Dickey*) "to make a diligent, good faith effort to bring a defendant to trial within a reasonable time, even when he is serving a sentence in a Federal prison outside the State involved" (S. Rep. No. 91–1356, *supra,* at 1; H.R. Rep. No. 91–1018, 91st Cong., 2d Sess. 2 (1970)). Similarly, in discussing the need for the legislation, the reports at no time mention problems with outstanding federal detainers but specifically note that "a majority of detainers filed by States are withdrawn near the conclusion of the Federal sentence" (S. Rep. No. 91–1356, *supra,* at 3; H.R. Rep. No. 91–1018, *supra,* at 3). The sections on impact and cost contain a statement by the Director of the Bureau of Prisons that "the cost of the legislation to the Federal Government would be comparatively small, *inasmuch as under the agreement costs are borne by the jurisdiction in which the charges are pending*" (emphasis supplied). S. Rep. No. 91–1356, *supra,* at 4; H.R. Rep. No. 91–1018, *supra* at 4.

We also note that the legislation had been introduced at the request of the Attorney General (H.R. Rep. No. 91–1018, *supra,* at 1) and that the Department of Justice gave it an unequivocal endorsement. In his supporting letters, the Deputy Attorney General expressed concern that "in the greater number of cases detainers filed by States are withdrawn when Federal release is imminent" and stressed the urgency for the legislation in view of the fact that "[a]s a

result of [the *Smith* decision], a number of States are requesting federal prisoners" (S. Rep. No. 91–1356, *supra*, at 5, 6; H.R. Rep. No. 91–1018, *supra*, at 5, 6). He also noted that transfer to state authorities under the prior unstructured practice was "not feasible because the Federal term must run uninterruptedly, and therefore the prisoner must remain in the custody of a Federal official" (*ibid.*). The letters contain no indication, however, that it was thought that the power of the federal government to obtain state prisoners would become subject to new restrictions, including the veto of a state governor, or that the federal government would be required to keep all state prisoners in federal custody pending complete disposition of the federal charges. Remarking on the smooth passage of the Act, one judge has observed: "The idea that there would have been 'no opposition whatsoever' to the sort of results which have occurred in these cases is hard to accept." *United States* v. *Thompson, supra*, dissenting opinion of Judge Garth.

The terms of the Agreement itself, either by occasioning unnecessary deviations from historical practice or creating awkward results, also indicate that Congress did not understand the Agreement as applying to the United States as a receiving state. We have already noted that, contrary to the findings in Article I, federal proceedings involving state prisoners had long been conducted in the absence of the Agreement and that extending a veto power over federal trials to state governors would, if anything, impede the "expeditious and orderly disposition" of federal charges.

Similarly, the speedy trial provisions of Article IV (c), requiring that trial be commenced within 120 days after the prisoner's arrival in the receiving state, apply by their terms only to "any proceeding made possible by this article," a phrasing that plainly implies the existence of proceedings made possible by other means.

The provisions prohibiting return of prisoners to their original place of imprisonment prior to trial (Articles III(d), IV(e)), also cause unique and unwarranted problems for federal prosecutors. Because Article III(d) (and perhaps Article IV(c)) require disposition of all outstanding charges within a receiving state before the prisoner may be returned, literal application of the Agreement to the United States would require a single federal prosecutor to coordinate federal charges at one time throughout the entire United States. At the same time, the prosecutor would be barred by Article V(d) from trying the prisoner on any other outstanding federal charges prior to returning the prisoner to state custody unless a detainer had also been lodged with respect to such charges prior to obtaining custody of the prisoner under the Agreement. Such a provision makes sense in the case of state-state transfers, because it preserves the preexisting principle of extradition that the delivery of the prisoner was solely for trial on the charge respecting which extradition was sought and is necessary to protect the correlative right of the governor of the sending state to refuse a request under Article IV(a) of the Agreement. It makes no sense when a prisoner is

sought for federal trial, since there is no corresponding right to refuse rendition of the prisoner.

Literal application of the Agreement would also compel abolition or revision of the common federal practice of returning prisoners to nearby state facilities pending further proceedings. This forced result would actually run counter to the interests of the sending state and the prisoner in rehabilitation since the prisoner would be held in temporary status in a federal holding facility (often a local jail) rather than being allowed to continue in his regular programs within the sending state. Moreover, application of the "no return" provision to state prisoners with pending federal charges would put a significant strain on already overcrowded federal facilities (see *United States* v. *Mauro, supra,* 544 F. 2d at 590; *United States* v. *Sorrell, supra,* and *United States* v. *Thompson, supra*) or create a complicated system of paper transfers between state and federal prisons carried out not to serve the end of prisoner rehabilitation but simply to obviate the risk of dismissal of charges for technical errors.[25]

D. SUBSEQUENT ADMINISTRATIVE INTERPRETATION AND CONGRESSIONAL ACTIONS

1. The Act became effective on March 9, 1971. Although the Bureau of Prisons drafted a policy state-

[25] The bizarre results that can be produced by a literal application of the ban on return to the sending state are illustrated by *United States* v. *Thompson, supra,* in which the Third Circuit held that federal charges must be dismissed after a state prisoner was returned to state authorities following an absence of a couple of hours for arraignment, simply because the federal government did not, as it could have done, designate the state facility as the place of federal detention. See p. 45, *infra.*

ment explaining the responsibilities of a sending state under the Agreement, it is quite clear that the Department of Justice did not regard the Agreement as controlling the actions of the United States as a receiving state. Section 6 of the Interstate Agreement on Detainers Act contains an express congressional directive to the Attorney General to "establish such regulations, prescribe such forms, issue such instructions, and perform such other acts as he deems necessary for carrying out the provisions of this Act." Although there are hundreds, or even thousands, of cases each year in which state prisoners are obtained to face federal charges, and although the Agreement is replete with potential traps for the unwary prosecutor who overlooks the speedy trial and "no return" obligations imposed by Articles IV(c) and IV(e), the Department of Justice took no steps during the four and a half years between the effective date of the Agreement and the decision of the district court in *Mauro* to notify United States Attorneys of the obligations that accrue upon receipt of a prisoner from another jurisdiction pursuant to the Agreement.[25a]

[25a] Indeed, pursuant to Article VII of the Agreement, the Attorney General designated the Director of the Bureau of Prisons as the administrator of the Agreement for the federal government. 28 C.F.R. 0.96(q) and 0.96a (1971). That action reinforces the understanding that the United States participated in the Agreement on a limited basis, for while the Bureau of Prisons is deeply involved in the activities of the United States as a sending state, it would have virtually no role, other than the temporary housing of state prisoners, in use of the Agreement by the United States as a receiving state.

One can only conclude from this that the Department did not understand the Agreement to impose restrictions upon the United States when it was prosecuting state prisoners. The *ad prosequendum* writ continued to be utilized during this period to procure state prisoners, who were then regularly returned to state custody between the time of arraignment and trial on the federal charges, particularly when, as was often the case, the federal district in which charges were pending was located in the state of the prisoner's incarceration. And, so far as we can ascertain, federal judges and prosecutors calendared cases on the basis of local prompt-disposition plans rather than hewing to the deadlines and procedures of the speedy trial provisions of Article IV(c) of the Agreement.[26]

These actions of the Department of Justice, which sought passage of the legislation and was charged with its administration, are entitled to considerable weight in determining the meaning of the Act. *Youakim* v. *Miller,* 425 U.S. 231; *Johnson* v. *Robison,* 415 U.S. 361; *Perkins* v. *Matthews,* 400 U.S. 379; *United States* v. *American Trucking Ass'ns,* 310 U.S. 534.[27]

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[26] It was only with the decision of the district court in *Mauro* and ensuing adverse decisions in other courts that the Department realized that the Agreement might be construed to impose obligations upon the United States as a receiving state even when the attendance of a state prisoner had been obtained by means of the *ad prosequendum* writ. The Department of Justice has since taken steps to apprise United States Attorneys of the possible applicability of the Agreement in such circumstances, including the publication of several items in the United States Attorneys' Bulletin.

[27] State officials also generally do not appear to have treated the *ad prosequendum* writ issued by a federal court as constituting

2. Subsequent actions by Congress support this administrative interpretation. In January 1975, Congress enacted the federal Speedy Trial Act, 18 U.S.C. (Supp. V) 3161 *et seq.,* which contains specific and detailed provisions governing the interjurisdictional transfer of a prisoner "charged with an offense [and] serving a term of imprisonment in any penal institution." 18 U.S.C. (Supp. V) 3161(j)(1). The Act requires the federal government either to "undertake to obtain the presence of the prisoner for trial" (the Act does not specify the procedure by which the prisoner's presence may be secured) or to "cause a detainer to be filed with the person having custody of the prisoner," who is then obliged to inform the prisoner of the detainer and of his right to demand trial. If such a demand is made, the Act provides that the government must promptly seek to obtain the

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a "written request for temporary custody" activating their obligations under Article IV of the Agreement. The writs normally command delivery of the prisoner in fewer than 30 days, and their commands appear generally to have been obeyed without allowing the passage of the 30-day period for gubernatorial disapproval specified by the proviso to Article IV(a). And while it is impossible to state this with any assurance, as far as we are aware state custodians did not generally supply the notice provided by Article IV(b) to other United States Attorneys who had lodged detainers against a prisoner in those instances in which federal charges were pending in more than one district.

The defense bar seems also to have been unaware for the first few years after federal adherence to the Agreement of the possibility that the United States had incurred obligations thereunder as a receiving state. We have found only one published case prior to the district court's December 1975 decision in *Mauro* in which a claim was made by a defendant in such a context. *United States* v. *Ricketson,* 498 F. 2d 367 (C.A. 7), certiorari denied, 419 U.S. 965.

prisoner's presence. 18 U.S.C. (Supp. V) 3161(j)(1)–(3).

Were the Interstate Agreement on Detainers already applicable to the United States as a receiving state, the provisions of the Speedy Trial Act relating to transfers of prisoners would be at best redundant and at worst directly inconsistent. Both Acts allow state prisoners to seek trial on federal charges after a detainer is filed, and both Acts contemplate that the federal government shall assure speedy trials. However, the Speedy Trial Act provides that trial must commence within 60 days of arraignment (Section 3161(c)), while the Agreement provides that trial must occur either within 180 days after the prosecutor's receipt of the prisoner's demand for final disposition of the charges, or within 120 days of the prisoner's arrival in the receiving state pursuant to a prosecutorial request for custody (Article V(c)). The Speedy Trial Act has elaborate tolling provisions (Sections 3161(h) and (i)) that the Agreement lacks. Likewise, the Agreement provides that the prisoner may not be returned to the sending state before trial (Articles III(d), IV(e)), while the Act has no such provision.

The Speedy Trial Act also requires that a defendant be arraigned within ten days following the filing of an indictment. Section 3161(c). The legislative history of the Speedy Trial Act indicates that Congress intended the arraignment of an imprisoned defendant to take place within the ten-day period "where the defendant's presence could have been obtained by the exercise of prosecutorial initiative."

H.R. Rep. No. 93–1508, 93d Cong., 2d Sess. 31 (1974). Although the House Report also indicates that delay resulting from proceedings to transfer the prisoner is excludable in determining compliance with the time limitations under the Act (*id.* at 36), the Agreement *requires* a 30-day delay, even though the federal prosecutor may wish to process charges immediately and set the case for trial. Thus, the Agreement, if applied to the United States as a receiving state, would actually interfere with the manifest purpose of the Speedy Trial Act. See also *United States* v. *Sorrell*, and *United States* v. *Thompson, supra*, dissenting opinion of Weis, J., at 5.[28]

The language and legislative history of the Speedy Trial Act are totally inconsistent with the notion that there was any belief on the part of Congress that the United States was already operating under a totally comprehensive scheme governing the federal trial of state prisoners,[29] which the Agreement, as construed

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[28] As noted earlier (n. 16, *supra*), prisoners traditionally have been deemed to lack standing to challenge their production by means of the writ, since the transfer is solely a matter between the authorities of the two jurisdictions involved. If the Article IV(a) provision is held applicable to the writ, however, prisoners will have a new method for attempting to block valid criminal prosecutions, without any indication that such a result was intended by Congress.

[29] Although it would be possible to argue that the Speedy Trial Act applies only to federal trials of *federal* prisoners, that construction is not persuasive. First, the plain language of the Act speaks of prisoners "in *any* penal institution" without distinction, and can be limited to federal prisoners only by choosing to construe it in light of the language of the Agreement. If the statutes are read together with regard to the Congressional intent, how-

by the court of appeals in this case and in *United States* v. *Mauro, supra,* would be. The Speedy Trial Act's provisions regarding trial of already incarcerated individuals were derived from standards promulgated by the American Bar Association that "tracked a modern trend in State case law that holds that the government must exercise some degree of diligence in trying to obtain an imprisoned defendant's presence for trial * * *." (H.R. Rep. No. 93–1508, *supra,* at 34). Without any mention of the federal government, the Report then notes specifically that "[a] significant number of States * * * have ratified the draft of An Interstate Agreement on Detainers" (*ibid.*); this suggests a definite understanding that the federal government was not viewed as subject to comparable restrictions.[30] Similarly, in discussing the sanctions to be imposed on government

ever, that construction cannot be justified. Moreover, that construction would attribute to Congress an intent to impose different standards on federal prosecutors for state and federal prisoners, an illogical conclusion that finds no support in the language or legislative history of either Act.

[30] The provisions embodied in Section 3161(j) originated in Standard 3.1 of the American Bar Association's *Standards Relating to Speedy Trial* "as recommended by the Advisory Committee on the Criminal Trial in 1967, and approved by the House of Delegates in 1968." H.R. Rep. No. 93–1508, *supra,* at 34. Thus, the standard on which the Speedy Trial Act provisions are based was formulated prior to Congressional enactment of the Agreement. The House committee further noted that the ABA standard served as a model for a more general detainer provision in Section 9(b) of the *Model Plan for the United States District Courts of Achieving Prompt Disposition of Criminal Cases,* promulgated by the Judicial Conference pursuant to Rule 50(b) of the Federal Rules of Criminal Procedure. *Ibid.*

attorneys for unreasonable delay (18 U.S.C. (Supp. V) 3162(b)(4)), the House Report (*id.* at 36) contrasts the practice under the Agreement, stating that federal prosecutors should not suffer any hardship in the context of prisoner cases "since, unlike state practice in many jurisdictions [and under the Agreement] where the period in which the prisoner must be tried begins upon receipt of the demand for trial, the time limits do not apply until the defendant is actually present for * * * pleading."

Although the enactments of a later Congress are not conclusive regarding the intent of an earlier Congress, the actions of Congress in adopting the Speedy Trial Act surely constitute significant support for our basic submission—that, in adopting the Agreement, Congress did not understand that it would significantly alter the terms upon which the United States might obtain custody of State prisoners for federal prosecution. See *Califano* v. *Sanders,* 430 U.S. 99, 105–107.

There are two additional indications of Congress' view of the United States' role under the Agreement. A draft of the Senate Judiciary Committee Report on S. 1, 94th Cong., 1st Sess. (1975), the precursor of the comprehensive criminal code revision currently pending in Congress, states in pertinent part (S. Rep. No. 94–00, 94th Cong., 1st Sess. 984 (1975); emphasis in original):

> Federal prosecution authorities and all Federal defendants have always had and continue to have recourse to a speedy trial in a Federal court pursuant to 28 U.S.C. 2241(c)(5), the

> Federal writ of *habeas corpus ad prosequendum*. The Committee does not intend, nor does it believe that the Congress in enacting the Agreement in 1970 intended, to limit the scope and applicability of that writ.

Moreover, legislation currently pending in Congress would amend the Agreement's enabling statute by providing that the United States is a party to the agreement "as a 'sending state' for purposes of Article III and IV, but as a 'receiving State' for purposes of Article III only." S. 1437, 95th Cong., 1st Sess., Section 3201 (1977); H.R. 6869, 95th Cong., 1st Sess., Section 3201 (1977). Although that proposal would make the United States a receiving state for some purposes and consequently raise a partial inconsistency with the Speedy Trial Act, it would avoid many of the problems caused by reading the Agreement to make the United States a receiving state for all purposes and to circumscribe greatly the force and function of the historic writ of *habeas corpus ad prosequendum*.

3. While it is not a simple matter to reconcile the provisions of the *habeas corpus* statute, the Interstate Agreement on Detainers, and the Speedy Trial Act, we submit that the court of appeals in this case erred by giving conclusive effect to a literal reading of the Agreement based upon its definition of the United States as a "state" without distinction between the sending and receiving roles.[31] As we have discussed,

[31] We do not agree, however, that the Agreement, even read literally, supports the result reached by the court of appeals. See Part II, *infra*.

that interpretation is not in accordance with the Congressional understanding. Nor, we submit, is it necessary in order to protect substantial rights of state prisoners facing federal charges or to achieve any of the important objectives of the Agreement. The writ of *habeas corpus ad prosequendum*, backed by the Sixth Amendment and the Speedy Trial Act, serves those purposes equally well.

Thus, if the United States is understood to be only a sending state for purposes of the Agreement, it may seek state prisoners for trial on federal charges, as it has consistently in the past, by the *ad prosequendum* writ. Under the Speedy Trial Act, 18 U.S.C. (Supp. V) 3161(j)(1), a government attorney who "knows that a person charged with an offense is serving a term of imprisonment in any penal institution" must promptly "undertake to obtain the presence of the prisoner for trial," unless he promptly "cause[s] a detainer to be filed with the person having custody of the prisoner and request[s] him to so advise the prisoner and to advise the prisoner of his right to demand trial." Should he pursue the former course, the arraignment must be held within 10 days of the filing of the indictment, and the trial held within 60 days of the arraignment (Section 3161(c)), excluding "[a]ny period of delay resulting from other proceedings concerning the defendant" (Section 3161(h)(1)) and various other periods of delay (Section 3161(h)(2) and (8)). Should he elect to lodge a detainer, the defendant may demand trial (Section 3161(j)(3) (Supp V)), and "[u]pon the receipt of

such notice, the attorney for the Government shall promptly seek to obtain the presence of the prisoner for trial." Again, the prisoner must be tried within 60 days of his arraignment. States would retain the right, of course, to request federal prisoners under Article IV of the Agreement.

The foregoing reconciliation of the various pertinent federal statutes creates a rational structure regulating the trial of federal prisoners on state charges and of state prisoners on federal charges. The protections afforded by Article IV of the Agreement in the case of state-state prisoner transfers become superfluous in the case of state-federal transfers because of the availability of the protections of the Speedy Trial Act.

It is true, of course, that nothing in the *habeas corpus* statute or the Speedy Trial Act provides for an automatic dismissal of charges where the defendant has been returned to the state prison before his federal trial, see *United States* v. *Mauro, supra,* but in the context of federal prosecutions of state prisoners, that requirement creates far more problems than it solves. Unlike interstate transfers, the production of state prisoners to face federal charges often takes place within the same state (see *United States* v. *Mauro, supra; United States* v. *Kenaan, supra; United States* v. *Sorrell, supra; United States* v. *Thompson, supra*), and in such circumstances return of the prisoner to the state prison enables him to continue his rehabilitation with minimal disruption. Since the writ is subject to immediate execution, there is also no

problem with the cumulative 30-day delays that a series of requests under Article IV would require. Moreover, it is quite common for federal authorities to designate state prisons as places of federal detention. Unless the Agreement was intended to prohibit this practice,[22] the so-called "right" not to be returned is, in the state-federal context, really nothing more than an opportunity to take advantage of clerical errors or similar technicalities. Preservation of that possibility is not essential to a fair system of state-federal transfers.

Moreover, mechanical insistence on this "right" may lead to ridiculous results. In *United States* v. *Sorrell, supra,* and *United States* v. *Thompson, supra,* the Third Circuit, relying in part on the Second Circuit's opinion in *Mauro,* held that otherwise valid federal indictments had to be dismissed because the defendants had been returned to Pennsylvania state prisons without trial following their arraignments in the Philadelphia district court pursuant to writs *ad prosequendum,* even though there are no federal facilities in Philadelphia for housing defendants awaiting federal trial. In both cases, the defendants were removed from nearby state facilities, produced for arraignment before the district court, and returned to the state prison the same day. In *Sorrell,* the interuption of the defendant's rehabilitation program consisted solely of travel time between the state facility

[22] There is no evidence that Congress believed the federal government would have to eliminate this practice upon passage of the Agreement.

and the federal courthouse and a brief courtroom appearance for arraignment; in *Thompson,* the defendant was returned following arraignment to a state prison located less than 10 miles from the courthouse, which was also used to house federal prisoners pursuant to a contract between the United States and the Commonwealth of Pennsylvania. Thus, had the United States arranged for the technical "paper" transfer of Thompson from state to federal custody, even though he would have remained in the very same institution, the indictment would not have been dismissed.[33]

We therefore believe that although the language of the Interstate Agreement on Detainers does not expressly reflect the understanding of Congress that the United States would participate only as a sending state, it should be interpreted in light of the *habeas corpus* statute and the Speedy Trial Act to embody that understanding. In that event, of course, respondent would not be entitled to rely on the speedy trial provisions of the Act, though he would be entitled to have his speedy trial claims considered in terms of the Sixth Amendment guarantee and local rules.[34]

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[33] We recognize that, under the Second Circuit's ruling in *United States* v. *Chico*, 558 F.2d 1047, that court would not hold the Agreement applicable under the circumstances which obtained in *Sorrell* and *Thompson*. Nevertheless, we believe that those cases are relevant to appreciate the extreme consequences that may result from adherence to the decision below.

[34] Respondent raised claims under the Sixth Amendment and Rule 4 of the Plan for Prompt Disposition of Criminal Cases of the Southern District of New York (Pet. App. 5a, n. 4). The court of appeals did not reach those issues (*ibid*).

If the Court concludes that the United States is a receiving as well as a sending state, however, we submit that the Agreement is nevertheless inapplicable to this case, where respondent was produced pursuant to an *ad prosequendum* writ. Even strictly adhering to the language of the Agreement, there is no sound basis for concluding that the writ should be treated as a "request" under Article IV. We next discuss this point.

II. A WRIT OF *HABEAS CORPUS AD PROSEQUENDUM* IS NOT A "REQUEST" FOR PURPOSES OF ARTICLE IV OF THE AGREEMENT

We have previously discussed (pp. 18–22, *supra*) the long-standing federal practice of obtaining state prisoners by means of the writ of *habeas corpus ad prosequendum,* a method that proved wholly satisfactory. The court of appeals in this case held, however, that Congress intended to condition further use of the writ upon compliance with Article IV of the Interstate Agreement on Detainers. The court reached that result by concluding that "whether or not a writ of habeas corpus ad prosequendum constitutes a 'detainer,' see *United States* v. *Mauro, supra,* once a federal detainer has been lodged against a state prisoner the habeas writ constitutes a 'written request for temporary custody' within the meaning of Article IV of the Detainers Act" (Pet. App. 21a). We recognize that the term "request" is sufficiently ambiguous that it admits of the broad definition given by the court of appeals, encompassing the demand embodied in the court-issued writ *ad prosequendum,* but this construc-

tion can hardly be said to be compelled by the statutory language, and, we submit, the terms of the statute and its legislative history compel the opposite result.[25]

It is well established that a repealer of an existing statute will not be lightly inferred from the passage of potentially inconsistent legislation. *Rosencrans* v. *United States,* 165 U.S. 257, 262; *United States* v. *Jackson,* 302 U.S. 628, 632; *Colorado River Water Conservation Dist.* v. *United States,* 421 U.S. 946. By issuance of an *ad prosequendum* writ, the United States for nearly 200 years has been able to obtain custody of a state prisoner for federal trial. The writ has been subject to immediate execution, and, it is believed (pp. 20–21, *supra*), compliance with its terms has been mandatory upon the states. If continued housing of the prisoner during federal proceedings could be better handled by the state authorities or if such an arrangement were more consistent with his rehabilitation prospects, the federal government was always free to return the prisoner to state prison. Speedy trials have always been required, of course, under the Sixth Amendment and, later, under applicable local rules.

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[25] In the Speedy Trial Act, which in our view does apply to proceedings initiated by the *ad prosequendum* writ, Congress has provided that a government attorney may secure a prisoner by presenting "a properly supported request for temporary custody of such prisoner for trial" (18 U.S.C. (Supp. V) 3161(j)(4)). As the legislative history of the Speedy Trial Act, unlike the history of the Detainers Act, unequivocally shows that its provisions are to have broad applicability (see, *e.g.*, H.R. Rept. No. 93–1508, *supra*), we believe that the term "request," as used in the Act, would include an *ad prosequendum* writ.

Neither the language nor the legislative history of the Interstate Agreement on Detainers Act makes any mention of the writ or suggests an intention to impose unnecessary conditions on its use (see pp. 29–34, *supra*). Had Congress intended to transform the writ into a mere "request" to state officials, rather than a demand presumably backed by the force of the Supremacy Clause, some recognition of that fact surely would have been indicated. Similarly, some reference would be expected to the provision of Article IV(a) requiring a 30-day delay before the writ could be honored. Yet Congress appears to have contemplated neither these changes nor the additional restrictions placed upon return of the prisoner to state facilities or the timing of federal trials.

Moreover, the speedy trial provisions of Article IV(c), on which respondent relies, apply by their terms only to "any proceeding made possible by this Article." While that language may be appropriate when a state receives custody of a prisoner through the Agreement rather than through the cumbersome extradition process, it is simply inapplicable when the United States obtains a prisoner pursuant to the writ *ad prosequendum*. Production of state prisoners by way of the writ had been "standard operating procedure" well before 1971 (see *United States* v. *Schurman, supra*) and was not in any sense "made possible" by federal subscription to the Agreement. Thus, under a literal reading of Article IV(c), the speedy trial requirements do not apply to proceedings initiated by the *ad prosequendum* writ.

The relevant committee reports state that the Agreement "provides *a* method [for] prosecuting authorities [to] secure prisoners serving sentences in other jurisdictions," S. Rep. No. 91–1356, *supra,* at 2; H.R. Rep. No. 91–1018, *supra,* at 2 (emphasis supplied). They thus negate the suggestion that the Agreement was being adopted as the sole method. The Fifth Circuit has observed: "Had there been an intent to make the Agreement exclusive and to, thereby, impliedly repeal 28 U.S.C. § 2241(c)(5), the committees would hardly have used the word 'a' to describe the method provided by the Agreement." *United States* v. *Scallion, supra,* 548 F. 2d at 1171 (footnote omitted).

The conditions imposed on the prosecution by Article IV, sensibly read, are the *quid pro quo* for the procedure made available to the prosecution by Article IV. For states that otherwise would be relegated to extradition proceedings, acceptance of those conditions is both reasonable and desirable. But it is completely different to suppose that Congress, which was concerned with giving the states a means to obtain federal prisoners, intended to impose new and at times burdensome conditions on the federal government when the latter derived no benefit from the Agreement but followed the traditional method used long before the Agreement was drafted.[36]

[36] Quite plainly, the Massachusetts authorities in this case did not consider the writ as a "request" subject to a 30-day period of delay any more than the district court and the prosecutor had. They delivered respondent promptly to federal custody within one week from the date the writ was issued.

The court of appeals, while noting that this position "might at first blush appear to have some theoretical appeal" (Pet. App. 7a), found it ultimately inconsistent with "Congress' purpose * * * which was to provide a comprehensive and coherent solution to a multiplicity of problems that had prior to the adoption of the Act beset prisoners, prosecutors, judges, prison authorities, and parole boards alike under the old detainer system" (Pet. App. 18a–19a). In determining "Congress' purpose," however, the court relied entirely on cases and articles dealing with the general detainer problem (Pet. App. 8a–17a)—materials that were almost invariably concerned with disposition of state charges—and completely ignored the more pertinent materials actually before Congress. As we have discussed (pp. 29–32, *supra*), Congress considered this legislation at the urging of the Department of Justice, in light of this Court's decisions in *Smith* v. *Hooey, supra,* and *Dickey* v. *Florida, supra,* and was primarily concerned with giving states greater access to federal prisoners and with disposing of long-standing (often eventually untried) state detainers.

Moreover, to the extent that Congress might have been concerned about the effects of federal detainers, it makes no sense to suppose that it attacked the problem by imposing additional conditions on federal prosecutors already processing the federal charges by writ of *habeas corpus ad prosequendum.* The remedy for stale detainers is found in Article III, which allows the prisoner to request trial on any untried indictment, information, or complaint upon which a

detainer has been lodged, and which requires prosecutors in the appropriate jurisdictions to bring him to trial within 180 days of delivery of that request. Article IV, on the other hand, was included to give member jurisdictions an expedient method of obtaining prisoners, a non-existent problem for the federal government. It is thus unnecessary and illogical to construe Article IV broadly in order to meet concerns already addressed in Article III.

The court of appeals also neglected Congress' further efforts to deal with the detainer problem in the Speedy Trial Act (see pp. 37–41, *supra*). In deciding whether Congress intended by the Detainers Act "to provide a comprehensive and coherent solution" to the detainer problem, it is surely significant that Congress four years later passed legislation to give prisoners the right to a speedy trial on all federal detainers—and that it did so without any suggestion that the issue was already dealt with by existing legislation. That later action is consistent with the position that Congress enacted the Detainers Act to solve specific problems concerning state charges and detainers, not to revise significantly the procedures by which the federal government had brought state prisoners to trial.

In sum, assuming this Court concludes that the United States adhered to the Agreement in 1971 as both a receiving and a sending state, sound principles of statutory construction nevertheless compel the conclusion that the writ of *habeas corpus ad prosequendum* is not a "written request for temporary

custody" subjecting federal prosecutors to the speedy trial and "no return" provisions of Article IV of the Agreement.

III. RESPONDENT WAIVED HIS RIGHT TO INVOKE THE SPEEDY TRIAL REQUIREMENTS OF THE AGREEMENT BY FAILING TO RAISE THE ISSUE BEFORE THE DISTRICT COURT

Shortly after respondent was arrested by federal authorities, and before any indictment had been filed, he sent letters to the United States Attorney and the United States District Court for the Southern District of New York requesting a speedy trial on the federal charges (App. 87–90). On November 4, 1974, respondent moved to dismiss the superseding indictment on speedy trial grounds (App. 83–86), and on February 18, 1975, he opposed a further continuance of his trial on that basis (App. 93–94). On September 2, 1975, at the commencement of his trial, respondent again sought unsuccessfully to have the indictment dismissed for want of a speedy trial (App. 100–105). Respondent relied solely on the Sixth Amendment and the local rules of the Southern District as the basis for his contentions; no reference was made to the Interstate Agreement on Detainers.

Respondent's trial took six days. The government called 36 witnesses and read the stipulated testimony of 12 additional witnesses to the jury. At the conclusion of trial the jury found respondent guilty on all counts. At no time during or after trial did respondent claim before the district court that he was

being denied rights under the Interstate Agreement. That issue was first raised in respondent's brief before the court of appeals; that court, without discussing the consequences, if any, of respondent's dilatoriness, concluded that the Agreement required dismissal of all charges.

We submit that respondent's failure to present his claim under the Agreement to the district court constituted a waiver of that claim as a matter of federal law.[37] Although "an approach, [which] presum[es] waiver of a fundamental right from inaction, is inconsistent with this Court's pronouncements on waiver of constitutional rights," *Barker* v. *Wingo,* 407 U.S. 514, 525, the right to trial within a specified period under the Interstate Agreement is neither constitutional nor fundamental. Unlike the Sixth Amendment right to a speedy trial, which is "one of the most basic rights preserved by our Constitution," *Klopfer* v. *North Carolina,* 386 U.S. 213, 226, the right to an expedited trial under the Agreement is a matter of legislative grace subject to limitation or revocation at the discretion of Congress. While the provisions of Article IV(c), assuming they are applicable at all, do provide benefits to state prisoners, it is doubtful that Congress intended defendants to be able to claim those benefits at any stage of the proceedings against them, whatever the effect on customary judicial procedures might be.

[37] This argument was made by the government to the court of appeals (see Br. 18–20).

By its nature, the right to an expedited trial under the Agreement is more closely analogous to rights conferred by various statutes of limitations, see *e.g.,* 18 U.S.C. 3282 *et seq.,* than to the constitutional right to a speedy trial.[38] Like the statutory speedy trial right, statutes of limitations serve interests of the potential criminal defendant in limiting the period of uncertainty and anxiety that he faces as well as interests of the public in assuring more expeditious resolution of criminal cases. Yet it is well-established that "[t]he statute of limitations is a defense and must be asserted *on the trial* by the defendant in criminal cases, *United States* v. *Cook,* 17 Wall. 168 * * *." *Biddinger* v. *Commissioner of Police,* 245 U.S. 128, 135 (emphasis supplied). See also *United States* v. *Wild,* 551 F. 2d 418, 422 and n. 7 (C.A. D.C.); *United States* v. *Franklin,* 188 F. 2d 182 (C.A. 7). Even a post-trial motion before the trial court has been regarded as too late to invoke the statute of limitations as a bar to prosecution and conviction. *United States* v. *Kenner,* 354 F. 2d 780 (C.A. 2). "The defense of the statute of limitations must be raised before or during the trial. 'If this is not done and a verdict of guilty is rendered, sentence may be validly imposed' " (*id.* at 785; citations omitted).[39] We believe that a similar rule is ap-

[38] Even where the constitutional right is involved, failure to assert it is significant. "We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Barker* v. *Wingo, supra,* 407 U.S. at 532.

[39] An exception has been made where the facts giving rise to the statute of limitations claim could not have been known until the verdict. See *Askins* v. *United States,* 251 F. 2d 909 (C.A. D.C.) (defendant indicted for capital offense without statute of limita-

propriate where the defendant belatedly relies on a statutory speedy trial claim.

Indeed, Rule 12, Fed. R. Crim. P., appears to preclude presentation of such claims for the first time on appeal. Subsection (b) of Rule 12 provides that "[a]ny defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion" and further sets out certain objections that must be raised before trial. Under subsection (f), failure to raise the latter objections at the specified time "shall constitute waiver therefor." Although a defense based on a statute of limitations or an expedited trial statute may not be included within the category of defenses that must be raised *before* trial, it does not follow that a defendant may raise such a claim for the first time on appeal. Professor Moore has suggested that Rule 12, which expressly preserves the right to raise claims of lack of jurisdiction and failure to charge an offense at any time, "may by negative implication be interpreted as foreclosing the other defense if not raised [before trial or] during the trial itself." 8 Moore's *Federal Practice* ¶1203[1], pp. 12–17 to 12–18 (2d ed. 1976); see 1 Wright, *Federal Practice and Procedure,* § 93, pp. 409–410 (2d ed. 1970) (interpreting former Rule 12); *United States* v. *Wild,*

tions (18 U.S.C. 3281) was convicted on non-capital lesser included offense subject to a 5-year period of limitation (18 U.S.C. 3282). No comparable exception is required by the facts of this case.

supra, 551 F. 2d at 424. Professor Moore specifically refers to limitations statutes in that regard, noting: "It seems clear at least that the defense of the statute of limitations should be raised no later than the trial." *Ibid.*

Where other statutory speedy trial rights have been conferred, Congress has made plain its intention to limit their exercise to prescribed times. Thus, claims under the Speedy Trial Act must be made before trial or plea. Section 3162(a)(2) (Supp. V), Title 18, specifically provides that "[f]ailure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or *nolo contendere* shall constitute a waiver of the right to dismissal under this section."[40]

Requiring that statutory speedy trial claims be raised before conviction works no substantial hardship on defendants and promotes the orderly administration of justice. It is already well established that appellate courts "need not ordinarily consider grounds of objection not presented to the trial court" (*Anderson* v. *United States,* 417 U.S. 211, 217, n. 5). Although a limited exception has developed for errors that "seriously affect the fairness, integrity or public reputation of judicial proceedings" (*United States* v. *Atkinson,* 297 U.S. 157, 160), that exception is not

[40] We recognize, of course, that Congress did not include a similar provision in the Interstate Agreement on Detainers Act. We do not regard that omission as indicating a different intent, however, in view of fact that the Agreement was adopted without change and without any evident awareness that it might apply to the United States as a receiving state.

applicable here. Respondent was given a full and fair opportunity to establish his innocence at trial.

Indeed, the Second Circuit itself has recently recognized that claims under the Agreement are not generally the sort of extraordinary claims that would justify collateral relief under 28 U.S.C. 2255. *Edwards* v. *United States,* No. 77–2048, decided October 25, 1977.[41] The court concluded that violation of the Agreement neither constituted "'a fundamental defect which inherently results in a complete miscarriage of justice'" nor presented "'exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent.'" Slip op. 126, quoting *Hill* v. *United States,* 368 U.S. 424, 428 (emphasis in original); see *Davis* v. *United States,* 417 U.S. 333, 346. Similar considerations should be relevant in determining whether respondent is entitled to relief under the Agreement on grounds not raised in the trial court. In view of the substantial expenditure of judicial resources that trial requires, and in view of the pressing demands for such resources imposed by the Speedy Trial Act, it is entirely reasonable to insist that defendants claim the benefits of a statutory speedy trial provision before they have been tried, convicted, and sentenced.

In this case respondent has neither offered a satisfactory explanation for his failure to mention the Agreement to the district court nor demonstrated any prejudice to his defense resulting from the delay of

[41] *Edwards* involved an alleged violation of Article IV(e), prohibiting return of a prisoner before trial.

his trial. The November 4, 1974, motion (App. 83–90) does not suggest that respondent had suffered any prejudice, and when his counsel later was asked about the grounds for the motion under the Sixth Amendment and the Southern District rules, he replied (App. 105): "It's really the length of time, in essence." If respondent in fact has suffered significant prejudice, he may still rely upon that fact in pursuing his Sixth Amendment claim (see *Barker* v. *Wingo, supra,* 407 U.S. at 532). That question remains open in the event of a remand in this case. See Pet. App. 5a, n. 4.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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NOVEMBER 1977.

APPENDIX

INTERSTATE AGREEMENT ON DETAINERS

PUB. L. 91–538, §§ 1–8, DEC. 9, 1970, 84 STAT. 1397–1403

§ 1. Short title

That this Act may be cited as the "Interstate Agreement on Detainers Act".

§ 2. Enactment into law of Interstate Agreement on Detainers

The Interstate Agreement on Detainers is hereby enacted into law and entered into by the United States on its own behalf and on behalf of the District of Columbia with all jurisdictions legally joining in substantially the following form:

"The contracting States solemnly agree that:

"Article I

"The party States find that charges outstanding against a prisoner, detainers based on untried indictments, informations, or complaints and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party States and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments informations, or complaints. The party States also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

"Article II

"As used in this agreement:

"(a) 'State' shall mean a State of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico.

"(b) 'Sending State' shall mean a State in which a prisoner is incarcerated at the time that he initiates a request for final disposition pursuant to article III hereof or at the time

that a request for custody or availability is initiated pursuant to article IV hereof.

"(c) 'Receiving State' shall mean the State in which trial is to be had on an indictment, information, or complaint pursuant to article III or article IV hereof.

"Article III

"(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party State, and whenever during the continuance of the term of imprisonment there is pending in any other party State any untried indictment, information, or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred and eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information, or complaint: *Provided*, That, for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decision of the State parole agency relating to the prisoner.

"(b) The written notice and request for final disposition referred to in paragraph (a) hereof

shall be given or sent by the prisoner to plaints and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party States and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints. The party States also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

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ing the continuance of the term of imprisonment there is pending in any party State any untried indictment, information, or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred and eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information, or complaint: *Provided,* That, for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decision of the State parole agency relating to the prisoner.

"(b) The written notice and request for final disposition referred to in paragraph (a) hereof shall be given or sent by the prisoner to the warden, commissioner of correction, or other official having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested.

"(c) The warden, commissioner of corrections, or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information, or complaint on which the detainer is based.

"(d) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall operate as a request for final disposition of all untried indictments, information, or complaints on the basis of which detainers have been lodged against the prisoner from the State to whose prosecuting official the request for final disposition is specifically directed. The warden, commissioner of corrections, or other official having custody of the prisoner shall forthwith notify all appropriate prosecuting officers and courts in the several jurisdictions within the State to which the prisoner's request for final disposition is being sent of the proceeding being initiated by the prisoner. Any notification sent pursuant to this paragraph shall be accompanied by copies of the prisoner's written notice, request, and the certificate. If trial is not had on any indictment, information, or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

"(e) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall also be deemed to be a waiver of extradition with respect to any charge or proceeding contemplated thereby or included therein by reason of paragraph (d) hereof, and a waiver of extradition to the receiving State to serve any sentence there imposed upon him, after completion of his term of imprisonment in the sending State. The request for final disposition shall also constitute a consent by the prisoner to the production of his body in any court where his presence may be required in order to effectuate the purposes of this agreement and a further consent volun-

tarily to be returned to the original place of imprisonment in accordance with the provisions of this agreement. Nothing in this paragraph shall prevent the imposition of a concurrent sentence if otherwise permitted by law.

"(f) Escape from custody by the prisoner subsequent to his execution of the request for final disposition referred to in paragraph (a) hereof shall void the request.

"Article IV

"(a) The appropriate officer of the jurisdiction in which an untried indictment, information, or complaint is pending shall be entitled to have a prisoner against whom he had lodged a detainer and who is serving a term of imprisonment in any party State made available in accordance with article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the State in which the prisoner is incarcerated: *Provided*, That the court having jurisdiction of such indictment, information, or complaint shall have duly approved, recorded, and transmitted the request: *And provided further*, That there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the Governor of the sending State may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

"(b) Upon request of the officer's written request as provided in paragraph (a) hereof, the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the

prisoner, and any decisions of the State parole agency relating to the prisoner. Said authorities simultaneously shall furnish all other officers and appropriate courts in the receiving State who has lodged detainers against the prisoner with similar certificates and with notices informing them of the request for custody or availability and of the reasons therefor.

"(c) In respect of any proceeding made possible by this article, trial shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving State, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

"(d) Nothing contained in this article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in paragraph (a) hereof, but such delivery may not be opposed or denied on the ground that the executive authority of the sending State has not affirmatively consented to or ordered such delivery.

"(e) If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e) hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice. "Article V

"(a) In response to a request made under article III or article IV hereof, the appropriate authority in a sending State shall offer to deliver temporary custody of such prisoner to the appropriate authority in the State where such indictment, information, or complaint is pending against such person in order that speedy and efficient prosecution may be had.

If the request for final disposition is made by the prisoner, the offer of temporary custody shall accompany the written notice provided for in article III of this agreement. In the case of a Federal prisoner, the appropriate authority in the receiving State shall be entitled to temporary custody as provided by this agreement or to the prisoner's presence in Federal custody at the place of trial, whichever custodial arrangement may be approved by the custodian.

"(b) The officer or other representative of a State accepting an offer of temporary custody shall present the following upon demand:

"(1) Proper identification and evidence of his authority to act for the State into whose temporary custody this prisoner is to be given.

"(2) A duly certified copy of the indictment, information, or complaint on the basis of which the detainer has been lodged and on the basis of which the request for temporary custody of the prisoner has been made.

"(c) If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment, information, or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in article III or article IV hereof, the appropriate court of the jurisdiction where the indictment, information, or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

"(d) The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untried indictments, informations or complaints which form the basis of the detainer or detainers or for prosecution on any other charge or charges arising

out of the same transaction. Except for his attendance at court and while being transported to or from any place at which his presence may be required, the prisoner shall be held in a suitable jail or other facility regularly used for persons awaiting prosecution.

"(e) At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending State.

"(f) During the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this agreement, time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allow.

"(g) For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending State and any escape from temporary custody may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law.

"(h) From the time that a party State receives custody of a prisoner pursuant to this agreement until such prisoner is returned to the territory and custody of the sending State, the State in which the one or more untried indictments, informations, or complaints are pending or in which trial is being had shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping, and returning the prisoner. The provisions of this paragraph shall govern unless the States concerned shall have entered into a supplementary agreement providing for a different allocation of costs and responsibilities as between or among themselves. Nothing herein

contained shall be construed to alter or affect any internal relationship among the departments, agencies, and officers of and in the government of a party State, or between a party State and its subdivisions, as to the payment of costs, or responsibilities therefor.

"Article VI

"(a) In determining the duration and expiration dates of the time periods provided in articles III and IV of this agreement, the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

"(b) No provision of this agreement, and no remedy made available by this agreement shall apply to any person who is adjudged to be mentally ill.

"Article VII

"Each State party to this agreement shall designate an officer who, acting jointly with like officers of other party States, shall promulgate rules and regulations to carry out more effectively the terms and provisions of this agreement, and who shall provide, within and without the State, information necessary to the effective operation of this agreement.

"Article VIII

"This arrangement shall enter into full force and effect as to a party State when such State has enacted the same into law. A State party to this agreement may withdraw herefrom by enacting a statute repealing the same. However, the withdrawal of any State shall not affect the status of any proceedings already initiated by inmates or by State officers at the time such

withdrawal takes effect, nor shall it affect their rights in respect thereof.

"This agreement shall be liberally construed so as to effectuate its purposes. The provisions of this agreement shall be severable and if any phrase, clause, sentence, or provision of this agreement is declared to be contrary to the constitution of any party State or of the United States or the applicability thereof to any government, agency, person, or circumstance is held invalid, the validity of the remainder of this agreement and the applicability thereof to any government, agency, person, or circumstance shall not be affected thereby. If this agreement shall be held contrary to the constitution of any State party hereto, the agreement shall remain in full force and effect as to the remaining States and in full force and effect as to the State affected as to all severable matters."

§ 3. Definition of term "Governor" for purposes of United States and District of Columbia

The term "Governor" as used in the agreement on detainers shall mean with respect to the United States, the Attorney General, and with respect to the District of Columbia, the Commissioner of the District of Columbia.

§ 4. Definition of term "appropriate court"

The term "appropriate court" as used in the agreement on detainers shall mean with respect to the United States, the courts of the United States, and with respect to the District of Columbia, the courts of the District of Columbia, in which indictments, informations, or complaints, for which disposition is sought, are pending.

§ 5. Enforcement and cooperation by courts, departments, agencies, officers, and employees of United States and District of Columbia

All courts, departments, agencies, officers, and employees of the United States and of the District of Columbia are hereby directed to enforce the agreement on detainers and to cooperate with one another and with all party States in enforcing the agreement and effectuating its purpose.

§ 6. Regulations, forms, and instructions

For the United States, the Attorney General, and for the District of Columbia, the Commissioner of the District of Columbia, shall establish such regulations, prescribe such forms, issue such instructions, and perform such other acts as he deems necessary for carrying out the provisions of this Act.

§ 7. Reservation of right to alter, amend, or repeal

The right to alter, amend, or repeal this Act is expressly reserved.

§ 8. Effective date

This Act shall take effect on the ninetieth day after the date of its enactment [Dec. 9, 1970].

U.S. GOVERNMENT PRINTING OFFICE: 1977